CASE NUMBER 87-1313

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE DAYTON POWER AND LIGHT COMPANY — PETITIONER

VS.

THE OHIO CIVIL RIGHTS COMMISSION, et al. — RESPONDENT

On Writ of Certiorari To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR SAMUEL I. PRATHER

EDWARD S. MONOHAN
P.O. Box 157
Florence, Kentucky
41022-0157
606-283-1140
(Counsel of Record)

KENNETH W. SCOTT
P.O. 157
Florence, Kentucky
41022-0157
606-525-0500

ATTORNEYS FOR RESPONDENT
SAMUEL I. PRATHER

QUESTIONS PRESENTED FOR REVIEW

1) Can racial comments by a white supervisor of a discharged black employee provide the nexus necessary to a finding of discrimination?

2) Does this Court have Appellate Jurisdiction when there is no federal question?

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Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)

Williams v. Kaiser, 323 U.S.471,485; (1944)

STATUTES

Ohio Revised Code Section 4112.02(A)

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Respondent, Samuel I. Prather, asks this Court to deny the petition for a writ of certiorari seeking review of the judgment of the Ohio Supreme Court.

JURISDICTIONAL STATEMENT

The petitioner alleges that this Court has jurisdiction based on the existence of a federal question. The fact that Ohio has indicated its intention to follow the precedent of federal cases in interpreting state law does not create a federal question. No jurisdictional basis exists.

COUNTERSTATEMENT

Respondent Samuel I. Prather was working as a member of a maintenance crew employed at The Dayton Power and Light Company (DP&L) on Sunday, September 12, 1982. One of the units was down for a periodic cleaning. This was taking place on an overtime day, as was the custom. Prather entered the shop area in order to pick up some material to complete a job and observed

that the employees were standing around, relaxed, idly talking and laughing.

Prather learned that someone, engaged in horseplay, had punched some small holes in a water hose and plugged up one end. When foreman Hackathorn and another bargaining unit employee tried to pressure test the hose they were sprayed with water. A new hose was being prepared as Prather entered the shop area. Someone passed Prather a knife and told him to cut some holes in the new hose. Prather did so. Hackathorn, who was in the office, thought he saw Prather cutting the hose. Prather denied he had cut the hose. Both Mason and Hackathorn examined the hose and found that it had been cut.

Pranks and horseplay involving water were common at Stuart Station. Pranks that involved the minor destruction of company property were also common, such as, gluing

or welding lockers shut. Foreman Mason was aware of these pranks. Prior to September 12, 1982, he had not written up any employees for destruction of company property or horseplay. Horseplay and destruction of company property are technically violations of company policy.

Hackathorn and Mason reported the Prather incident to the manager of unit three on September 12, 1982. The manager of unit three reported it to the manager of Stuart Station. The station manager asked Elkins to investigate both incidents. Elkins secured statements from foreman Mason on September 14 about the Prather incident. On September 15 he secured another written statement from Mason where Mason states he was not aware of the first hose cutting incident prior to the time he observed Prather cutting the hose. Elkins also reported that he talked to others who were

in the shop area at the time and all denied seeing Prather do anything.

Elkins recommended that Prather be discharged. He stated that Prather's actions were the result of a "basic flaw in character". He stated, "Mr. Prather does not see the right or wrong of damaging company property; be it in the act of horseplay or otherwise". Elkins reasoned that any lesser discipline would not cure Prather's basic "character flaw" and therefore he saw termination as the only option.

Ralston reviewed the written documents submitted by Elkins along with his recommendation. Ralston accepted Elkins recommendation that Prather be discharged and Prather was discharged, effective September 13, 1982.

Foreman Mason had made frequent racially derogatory remarks about Prather.

These included calling him a "black bastard" and a "nigger". On one occasion Mason told Prather that he would like to "march his fat black ass to the gate". After Prather was discharged Mason stated, "We finally got rid of that lazy, fucking nigger".

Foreman Hackathorn was a self-admitted racist. He had stated that he was prejudiced but was working on it. When Prather and Hackathorn were working together Hackathorn told Prather that he had problems with blacks.

The Ohio Civil Rights Commission found that Prather was subjected to harsher discipline because of his race.

REASONS FOR DENYING THE WRIT

Petitioner's basic disagreement with the decision below concerns Dayton Power and Light's view of the facts and the weight to

be given the evidence, not the formation of legal rules.

Additionally, petitioner has attempted to create a federal question where there is, in fact, none. The decision of the Ohio Supreme Court was based on adequate and independent state grounds.

ARGUMENT

A) DISCRIMINATORY INTENT MAY BE SHOWN BY PERSUADING THE TRIER OF FACT THAT THE DISCRIMINATORY REASON MORE LIKELY MOTIVATED THE EMPLOYER.

This is a case of disparate treatment. It was Prather's contention from the beginning that he would not have been discharged if he had not been black. Prather alleged that he was treated differently than others who had done the same or worse acts of horseplay. Taking all of the facts into consideration, the Ohio Civil Rights Commission, after extensive testimony on the

subject, found that the discharge was based entirely on the biased report of two supervisors who had strong racial motives to recommend that Prather be fired. Plant manager Robert Ralston discharged Prather without an independent investigation on his own but based entirely on a biased report.

The Ohio Civil Rights Commission determined that other acts of horseplay and worse had, in the past, not been punished by even so much as a reprimand. The only recognizable differences in Prather's case are that he was black and that he had supervisors who had racial animus. Those differences tipped the scale against him.

DP&L did not dispute that Prather was black, that he was qualified for his job and that he was discharged. Its response was that he was discharged for destruction of company property. Prather had persuaded the trier of fact that the "discriminatory

reason more likely motivated the employer". 1Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). This completes the nexus complained of by DP&L.

There is no reason for this Court to review this case.

B) THE OPINION OF THE OHIO SUPREME COURT IS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, THEREFORE, THERE IS NO FEDERAL QUESTION AT ISSUE IN THIS ACTION TO INVOKE THE SUPREME COURT'S APPELLATE JURISDICTION

"The Supreme Court's jurisdiction to review a State Court decision under 28 USCS section 1257, is dependent upon the presence of a federal question in the case." St.Louis I.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1907).

DP&L contends that federal question jurisdiction is present in this action because the Ohio Supreme Court adopted federal law as the body of law governing employment discrimination actions.

Prather contends that the Ohio Supreme Court's did not adopt federal law in this case, but instead, used federal decisions as persuasive authority in coming to an independent interpretation of Ohio Revised Code Ann., section 4112.02(A).

In its opinion in this case, the Ohio Supreme Court cited Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm., 66 Ohio St. 2d 192, 421 N.E.2d 128(1981), as authority for the proper evidentiary standard to be applied in administrative proceedings.

Prather contends that the Ohio Supreme Courts' use of the Plumbers case as an evidentiary standard, is not an adoption of federal law.

Prather further contends that even if the Ohio courts had used federal cases in interpreting state law, it would not raise that interpretation to the level of a

federal question, nor would it signal Ohio's adoption of federal discrimination law.

"Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it." Williams v. Kaiser, 323 U.S.471,485; (1944). Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

The opinion of the Ohio Supreme Court is supported by independent and adequate state grounds. Therefore, petitioner's contention that federal question jurisdiction is present in this action is in error.

CONCLUSION

The petition for certiorari should be denied.

EDWARD S. MONOHAN
P.O. Box 157
Florence, Ky. 41022-0157
(606) 283-1140
(Counsel of Record)

KENNETH W. SCOTT
P.O. Box 157
Florence, Ky. 41022-0157

ATTORNEYS FOR RESPONDENT
SAMUEL I. PRATHER

CERTIFICATE OF SERVICE

I, Edward S. Monohan, a member of the Bar of The Supreme Court of the United States and Counsel of Record for Samuel I. Prather, Respondent herein, hereby certify that three copies of the foregoing brief were mailed, United States 1st class mail, postage prepaid, on this 4th day of March, 1988, to Neil F. Freund, Esq. and Jane M. Lynch, Esq., Freund, Freeze and Arnold, 1000 Talbott Tower, Dayton, Ohio 45402, Attorneys for Petitioner and Jeffrey B. Rubenstein, Esq., Assistant Attorney General, 35 East 7th Street, Suite 700, Cincinnati, Ohio 45202

Edward S. Monohan

EDWARD S. MONOHAN
COUNSEL OF RECORD